because they protect and strengthen the infrastructure of Vermont's representative government. Under the Guarantee Clause,[3] Vermont's efforts to achieve those ends, among others, are entitled to deference even in the face of competing First Amendment interests.[4]

A. The Court Should Defer to a State's Effort to Preserve the Republican Form of its Government.

The Court should weigh the state interests affected by expenditure limits in the context of the particular system of

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[3] "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4.

[4] First Amendment interests have been advanced both against and in favor of campaign finance reforms. *See Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 400-401 (2000) (Breyer, J., concurring) ("constitutionally protected interests lie on both sides of the legal equation"). The Guarantee Clause is closely aligned with and predated the First Amendment protections weighing in favor of reform:

> Because it was adopted prior to the drafting and ratification of the First Amendment, and long before the First Amendment was applied to the states, the assurance of republican governments also can be seen as independently protecting public deliberations in the law-making process.

Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. Colo. L. Rev. 849, 865-869 (1994); *see also* Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 Wash. & Lee L. Rev. 767, 828 (2003) (protecting the republican form of government under the Guarantee Clause is a compelling government interest for enacting campaign finance reform). And some, such as former Chief Justice Rehnquist, have suggested that the Fourteenth Amendment incorporates only the "general principle" of the First Amendment (presumably on both sides of the campaign finance reform issue), which could further elevate the relative weight of the Guarantee Clause in this instance. *See Buckley*, 424 U.S. at 291 (Rehnquist, J., concurring and dissenting).

government that the spending limits were enacted to protect. *See generally* Lori Ringhand, *Defining Democracy: The Supreme Court's Campaign Finance Dilemma*, 56 Hastings L.J. 77 (2004). Here, the logical starting point is the republican form of government, from which flows its corresponding values of deliberation and public participation.

Vermont enacted expenditure limits to protect the integrity of the republican form of government it is, under the Guarantee Clause, constitutionally obliged to maintain. *See* U.S. Const. art. IV, § 4; *Minor* v. *Happersett*, 88 U.S. (21 Wall) 162, 175 (1874). Not only does the Guarantee Clause require states to maintain a republic, but it expressly compels the United States, which includes the federal judiciary, to help states achieve that goal. For this reason, the interest in preserving republican government weighs heavily in favor of supporting the constitutionality of a state statute and courts should defer to a state's determination that a challenged statute protects that interest. This deference is consistent with the Supreme Court's repeated affirmation, under the Guarantee Clause, of the states' right and responsibility to control their governments. *See Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) (each state has a "constitutional responsibility for the establishment and operation of its own government") (citing U.S. Const. art. IV, § 4); *see also Gregory* v. *Ashcroft*, 501 U.S. 452, 463 (1991).

Although all states have an obligation to maintain a republican form of government, they may choose to approach that goal differently. The states' varied sizes, demographic compositions, and political cultures require tailored strategies that respond to their individual circumstances. Familiar examples abound. Most states have bicameral legislatures, but one (Nebraska) has a unicameral legislature. State legislatures vary widely in number of representatives, the length of their terms, and whether term limits are imposed.

Terms of governors are for different numbers of years. States may or may not have certain positions such as lieutenant governors or treasurers, and some positions, such as the state official responsible for education, may or may not be an elected position.

State election practices also differ widely because states face different issues and challenges in achieving the goal of strong voter participation. Some states allow voter registration on-the-spot on election day; others set earlier registration deadlines. Some states allow mail-in voting and early voting opportunities before the traditional election day; others do not. States are in a good position to decide, based on such factors as their traditions, and the location and number of voters, how to achieve the goal of meaningful voter participation. Because of their intimate familiarity with their unique government systems and political cultures, states and their citizens have special insight on how to ensure that their systems remain republican in form and practice. And to protect and maintain truly representative democracies, states must be allowed to serve as testing grounds. *See New State Ice Co.* v. *Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This is especially true where liberty interests and the goal of representative government are at stake. Reasonable campaign finance strategies that fit the circumstances, goals, and needs of that state are entitled to deference by the courts, including this Court.

This deference is especially warranted where, as here, campaign finance laws were not enacted to handicap challengers. In adopting the expenditure limits at issue, the Vermont legislature responded to a groundswell of strong public policy arguments made by citizen groups. Vermont's response included higher spending limits for challengers than for incumbents, refuting the notion that the limits were designed to entrench current officeholders. Moreover, there

is evidence that mandatory spending limits do not insulate incumbents from successful challenge. *See* Tr. X-88 (Donald Gross) (stating that no mayoral incumbent won re-election while Albuquerque campaign spending law was in effect).[5]

B. A Republican Form of Government Depends Upon Deliberation and Political Participation.

Vermont's reasoning in favor of expenditure limits is not a pretext to insulate incumbents, but represents a genuine effort to preserve that state's republican form of government. "[T]he distinguishing feature of [the republican] form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *Duncan* v. *McCall*, 139 U.S. 449, 461 (1891); *see also The Federalist No. 14*, at 100 (James Madison) (Clinton Rossiter ed., 1961) ("[I]n a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives."). The power in the republic rests in its citizens, who bear ultimate responsibility for how the government is administered, while elected officials, for their part, are responsible for acting in the interest of those they represent. *See Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964).

Representative government is rooted in this mutually dependent relationship between elected officials and their constituents. That relationship in turn depends on public participation and deliberation (both by representatives and citizens). Elected officials have a responsibility to determine through vigorous debate and analysis the best interests of

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[5] "Tr." refers to the trial court transcript, which was filed in-full as part of the record before the Second Circuit; "Ex." refers to trial exhibit volumes also filed as part of the record below.

their communities. Officials should aspire not simply to aggregate preferences from various interests, but to deliberate public issues actively and determine the best course. The Founding Fathers contemplated this deliberative ideal: "The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs." *The Federalist No. 71*, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Representatives are charged with making decisions based on what they believe is right. In the campaign finance context, this Court has held that officeholders must be free from "undue influence" on their judgment, *see FEC* v. *Colo. Republican Fed. Campaign Comm.*, 533 U.S. 432, 441 (2001), so that they can deliberate and decide issues "on the merits." *See McConnell*, 540 U.S. at 153. It is legitimate for a state to conclude that expenditure limits facilitate legislating "on the merits" by improving policy debate.

In enacting expenditure limits, Vermont reached the reasoned conclusion, among others, that improved deliberation and participation must extend to the citizens who inform the debate about the community's best interest. Vermont believes, and rightly so, that political participation and deliberation is crucial to a republican form of government.[6] Indeed, without public participation, a state government is republican in name only. *Cf. California Democratic Party* v. *Jones*, 530 U.S. 567, 587 (2000) (Kennedy, J., concurring) ("the constitutional order must be

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[6] Alexis de Tocqueville observed that "[w]hat is understood by a republican government in the United States is the slow and quiet action of society upon itself. It is a regular state of things really founded upon the enlightened will of the people. It is a conciliatory government, under which resolutions are allowed time to ripen, and in which they are deliberately discussed, and are executed only when mature." Alexis de Tocqueville, *1 Democracy in America* 435-436 (Phillips Bradley ed., Vintage Books 1945).

preserved by a strong, participatory democratic process"). In a republic, citizens are "participator[s] in the government of affairs," Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), in *1 The Founders' Constitution* 142 (Philip B. Kurland & Ralph Lerner eds., 1987), and the burden rests squarely on them to debate those affairs and analyze "the relative merits of conflicting arguments." *See Bellotti*, 435 U.S. at 791; *see also Buckley*, 424 U.S. at 14 ("Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution.").

Public participation is integral to republican government for at least two reasons. *First*, it improves policy outcomes by making decision-makers aware of diverse perspectives. Vermont understood that in order for a legislature, or any other decision-making body, to settle on the best policy, it must have before it a diversity of perspectives. A broader range of perspectives provides legislators with more alternatives from which to choose, and the broader range of views increases the likelihood that the strengths and weaknesses of competing alternatives will be exposed. In addition, a breadth of perspectives tends to remedy any undue influence on policy decisions produced by the most forceful participants, who threaten to drown out those with meritorious, but different, ideas.

Second, public participation enhances the legitimacy of representative government. People are more likely to submit to government directives — to obey laws and regulations, pay taxes, join the National Guard — if they have participated in deciding how to spend those taxes, commit that National Guard, and craft those laws. *See* Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* 10 (2004) ("The hard choices that public officials have to make should be more acceptable, even to those who receive less than they deserve, if everyone's

claims have been considered on the merits, rather than on the basis of the party's bargaining power.").

Participation that improves decision-making and enhances government legitimacy takes many forms: voting, public debate through letters or web logs, campaign contributions, water cooler discussions, association membership, and candidacy for elected office. But in recent years, scholars have warned of declining political participation and how it has shifted power to a select few and undermined the quality of debate. *See* Robert Putnam, *Bowling Alone* 31-47, 336-349 (2000); Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life, in Civic Engagement in American Democracy* 498-506 (Theda Skocpol & Morris P. Fiorina eds., 1999). Realizing that the absence of participation was a threat to its republican form of government — Justice Brandeis warned that "the greatest menace to freedom is an inert people," *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) — Vermont fairly enacted expenditure limits to reverse the trend. Expenditure limits, as discussed below, bolster confidence in government, thereby increasing not only voting, but all manners of political participation.

III. THERE IS A FIRM BASIS FOR VERMONT'S CONCLUSION THAT SPENDING LIMITS AT THE STATE LEVEL BOLSTER THE REPUBLICAN FORM OF GOVERNMENT THROUGH PUBLIC INVOLVEMENT AND DELIBERATION.

The Vermont General Assembly found that campaign regulations in the form of expenditure limits enhance civic participation and voter deliberation — elements that it deemed critical to protect the integrity of its republican form of government. This is nothing new. This Court has recognized states' authority to regulate political campaigns to

promote and protect the integrity of their systems of government. *FEC* v. *Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (preventing actual and apparent corruption "directly implicate[s] 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process'") (citations omitted). Vermont heeded that message in enacting Act 64. Ultimately, both legal precedent and empirical evidence support Vermont's finding that expenditure limits enhance civic participation and deliberation.

1. Expenditure limits increase civic participation and deliberation by preventing corruption or the appearance of corruption. Indeed, it is well-settled that citizens are less inclined to participate in a government that they deem corrupt. *See Nixon*, 528 U.S. at 390. Vermont understood this when it enacted the expenditure limits and concluded that "[c]itizen interest, participation and confidence in the electoral process is lessened by . . . expensive campaigns." 1997 Vt. Laws Pub. Act 64 (finding No. 10).

Empirical analysis of congressional elections demonstrates that voter turnout is the same or lower in response to higher spending. Tr. X-58 (Gross). In a national poll, two-thirds of voters believed spending limits would improve the honesty and integrity of elections. Ex. III, E-1042 (Gross Report). A separate study in Minnesota corroborated these findings: there, one-third of voters said that they are less likely to participate in the electoral process if they perceive that donors have more influence than non-donors. David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 122 (1999).

2. Expenditure limits also increase public participation by helping to raise the level of competitiveness in electoral races. *See* American Political Science Ass'n.: Task Force on

Inequality and American Democracy, *American Democracy in an Age of Rising Inequality*, at http://www.apsanet.org, 5 (2004). The limits facilitate more competitive elections by eliminating the singular importance of campaign fundraising.[7] With limits in place, challengers have a greater chance of competing with incumbents, who almost always have an advantage in raising money. *See generally Raising the Limits: A Bad Bet for Campaign Finance Reform.* Because close elections emphasize and turn on mobilization of individual voters, more people participate in close elections both as voters and grassroots organizers.

3. In addition to increasing the competitiveness of elections, expenditure limits broaden opportunities for citizens to participate as candidates for elected office, opening up elections to candidates with a wider range of viewpoints.[8] Without expenditure limits, incumbents will remain favorites in most elections in large part because of the ease with which they can raise funds and outspend opponents. An advantage based on the ability to raise campaign dollars discourages citizens from becoming challengers, particularly lower-income and lower-middle-income citizens. *See* 1997 Vt. Laws Pub. Act 64 (finding No. 1) ("Election campaigns for statewide and state legislative offices are becoming too expensive. As a result

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[7] In the 2004 election year, 97% of congressional candidates who raised more money than their opponents won their elections. U.S. PIRG Education Fund, *Raising the Limits: A Bad Bet for Campaign Finance Reform* 4, 24 (2006). Incumbents for House and Senate seats who ran for re-election were successful 98% and 96% of the time respectively, due in large part to out-raising opponents an average ratio of 4.1 to 1. *Id.*

[8] In evaluating public finance systems for political campaigns, one court explained that the electorate is "entitled to have presented to it for its evaluation and judgment candidates from all walks of life." *Bang* v. *Chase*, 442 F. Supp. 758, 764 (D. Minn. 1977).

many Vermonters are financially unable to seek election to public office."); Tr. IX-132 (Elizabeth Ready) (Unrestrained spending "precludes normal people, even people that have a lot of political experience, from getting into the running for lieutenant governor, governor, because who wants to go out and raise, . . . a hundred thousand, two hundred thousand, a half million dollars? . . . And quite frankly, who can amongst normal members of the public?"). Expenditure limits improve the opportunities for citizens to become successful challengers by reducing the importance of fundraising and personal wealth in favor of grassroots methods of campaigning that are accessible to all potential candidates. Vermont's actions to promote greater civic participation through campaign expenditure limits are reasonable and deserve deference from this Court.

4. Expenditure limits also create opportunities for greater deliberation among elected officials, thereby promoting a more republican government that thoughtfully considers the interests of a broader electorate. By eliminating the incentive to amass endless campaign dollars, expenditure limits reduce the dependence of elected officials on relationships with wealthy contributors. In a system of unlimited expenditures, the affluent are heard more loudly and clearly than their less affluent counterparts, and officials act on input from an artificially narrowed group of constituents. *See Colorado Republican Fed. Campaign Comm.*, 533 U.S. at 441; *see also American Democracy in an Age of Rising Inequality*, at http://www.apsanet.org, 6. But in a truly representative government, elected officials make decisions that consider the viewpoints and interests of all of their constituents. When the government fails to meet this goal, it has failed to be truly republican in form. Because expenditure limits eliminate the arms race for campaign dollars, they relieve the pressure on elected officials to aggregate the interests of affluent constituents without deliberating on the interests of

the less affluent. Campaign finance reforms, particularly expenditure limits, "democratize the influence that money can bring to bear upon the electoral process." Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002). Likewise, less time spent raising campaign dollars means more time to consider and deliberate upon proposed laws. Because candidates and elected officials are then able to form policies based on deliberation of varying perspectives, citizens are more likely to view the government as legitimate (or free of corruption as discussed above). This, in turn, fosters broader participation, building an upward cycle of participation and legitimacy.

5. Expenditure limits also increase participation and deliberation by protecting and promoting direct voter contact. This voter contact is a critical interest for the citizens of Vermont as a means of guarding the state's republican form of government. The political culture of Vermont is built on a longstanding tradition of town hall meetings and grassroots campaigning that for centuries has increased citizen deliberation and political discourse. These traditions, fostered and carried out by the people of Vermont, inform elected officials and candidates of the diverse interests of the state's electorate. The Vermont General Assembly has continuously sought to protect this interest through legislation. Pet. App. 101a-102a (citing nearly a century of efforts to safeguard Vermont's system of government through campaign finance reform legislation).

Elected officials have admitted that the need to raise unlimited campaign funds directly limits the time they spend interacting with the average voter and the time spent deliberating on the issues and perspectives of their constituents. *See* U.S. PIRG, *The Case for Limits on Campaign Expenditures*, at http://www.buckbuckley.com (last visited Feb. 7, 2006). The Vermont General Assembly

passed Act 64 to protect the political traditions of the state, and particularly the traditions that foster deliberation and participation. The Second Circuit found that "the Vermont public perceives, legitimately, that candidates frequently spend an excessive amount of time fundraising and not enough time with voters." *See* Pet. App. 135a-144a; Tr. X-62 (Gross) ("In some of the highest [spending] congressional races, there [are] suggestions that often money is spent on factors which are not directly related to voter mobilization efforts or campaign efforts."). It is therefore reasonable and sound for Vermont to conclude that candidates, faced with expenditure limits, will better utilize their time in the interest of the electorate and spend the limited campaign dollars far more effectively through lower-cost grassroots efforts and direct voter contact.

CONCLUSION

Vermont has a compelling interest in guaranteeing a republican form of government through bolstering voter engagement and participation in elections and enhancing the debate on public and electoral issues. That interest is of constitutional significance and suffices by any measure as a compelling state interest that outweighs the interest of candidates with ample funds to spend without limit. Because that interest is so strong, and is asserted by a state with its own constitutional responsibilities in the area of republican self-governance and elections, it warrants deference by this Court. For the foregoing reasons, the Court should affirm the Second Circuit's decision with respect to Vermont's expenditure limits.

Respectfully submitted,

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Nos. 04-1528, 04-1539, and 04-1697

In the

SUPREME COURT OF THE UNITED STATES

NEIL RANDALL, et al., Petitioners
v.
WILLIAM H. SORRELL, et al., Respondents

VERMONT REPUBLICAN STATE COMM., et al., Petitioners
v.
WILLIAM H. SORRELL, et al., Respondents

WILLIAM H. SORRELL, et al., Petitioners
v.
NEIL RANDALL, et al., Respondents

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF NORMAN DORSEN, ARYEH NEIER, BURT NEUBORNE, JOHN SHATTUCK, HELEN HERSHKOFF AND CHARLES S. SIMS, AS FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION, IN SUPPORT OF RESPONDENTS WILLIAM H. SORRELL, et al., OUT OF TIME

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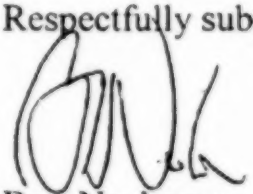
BEST AVAILABLE COPY

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

Movants hereby request leave to file the accompanying brief *amici curiae* out of time. Pursuant to the Court's scheduling order, the brief *amici curiae* should have been filed on or before February 8, 2006. *Amici* inadvertently understood the filing date to be February 10, 2006, and filed their brief with the consent of the parties out of time on that date.

Respectfully submitted,



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